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Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Wireless Compatibility With | ) | CC Docket No. 94-102 |
| E-911 Emergency Calling Systems | ) | |

## COMMENTS OF UNITED STATES CELLULAR CORPORATION

United States Cellular Corporation ("USCC") hereby files its comments in the above-captioned docket in response to the request for emergency declaratory ruling filed by Leah Senitte, the State of California's 9-1-1 Program Manager (the "Senitte letter"). USCC owns and/or operates cellular systems in 43 MSA and 100 RSA markets. Two of those markets, California RSAs #1 and #9, are located in California, where the controversy described in the Senitte letter has arisen. USCC accordingly has a large stake in the outcome of this proceeding.

### Introduction

The public notice requesting comments in this proceeding[1] and the Senitte letter ask three questions:

1. Do carriers have an obligation to deploy wireless E911 service (Phase I) in California despite the fact that State statutes do not provide immunity from liability for E911 service provided?

2. If carriers are obligated to deliver Phase I service without immunity from liability (either statutory or contractual), is the State required under the cost recovery rules to reimburse carriers for the cost of insurance policies covering their provision of wireless E911 service?

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[1] See, "Wireless Telecommunications Bureau Seeks Comment On Request For An Emergency Declaratory Ruling Filed Regarding Wireless Enhanced 911 Rulemaking Proceeding, Public Notice, released July 30, 1998.

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3. Regarding selective routing, what is meant in the Commission's E911 First Report and Order by the reference to the "appropriate PSAP"?

USCC believes that the answer to the first question is "No" and that therefore the second one need not be reached. If, however, the FCC continues to insist on E-911 deployment even in the absence of liability protection, then reimbursement for insurance coverage should certainly be considered an element of cost recovery. USCC would answer the third question concerning the "appropriate PSAP" by saying that the appropriate PSAP should be determined in accordance with state law. Our reasons for these answers are as follows.

## I. The FCC Should Make It Clear To California And All States That Protection From Liability Is A Requirement If E-9-1-1 Service Is To Be Offered

Under the FCC's Phase I requirements, since April 1, 1998 all wireless carriers have had to provide to the "appropriate PSAP" the telephone number of 911 callers and the location of the cell site or base station receiving a 911 call from any cellular telephone through the use of ANI and "pseudo-ANI" technologies. However, pursuant to 47 C.F.R. § 20.18(f), these requirements have not been applicable unless and until (1) the administrator of the designated PSAP has requested the service; (2) the PSAP is capable of receiving and utilizing the data elements associated with the service; and (3) a state mechanism for recovering the costs of the service has been created.

This type of regulation, which sets nationally applicable standards for a new service, but makes them inapplicable until the states have taken all necessary supporting actions to make the service viable, is the right approach, in that it requires both wireless carriers and state governments to act responsibly while not involving the FCC in micromanaging their relationship. In essence, the

FCC has told its licensees to prepare to offer E-911 service, but has also advised the states that unless they take their own responsibilities seriously, E-911 service will not have to be offered.

As this process moves forward, the FCC must continually monitor it to ensure that carriers and the states are continuing to meet their responsibilities within an evolving regulatory structure in which the goal, namely nationwide E-911 deployment with adequate cost recovery for carriers, remains the same, but the methods necessary to achieve the goal may have to change as the significance of certain matters becomes more apparent.

One such matter is the issue of immunity from liability for wireless carriers providing E-911 service under FCC mandate. USCC strongly believes that the obligation to offer E-911 service should be conditioned on an adequate limitation of liability.

Last year in its E-911 order, the FCC reiterated that it understood that liability was a potential problem, and referred to its preemption authority but at that time declined to act. The Commission stated:

> "Contrary to petitioners' speculative claim that current state laws are not likely to provide wireless carriers with adequate protection against liability, the record indicates that state legislative bodies and state courts are developing their own solutions to liability issues. While we recognize that not all states currently provide specific statutory limitation of liability protection for wireless carriers, we believe that state courts and state legislatures are the proper forum in which to raise his issue, not the Commission."[2]

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[2] Revision of the Compliance Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Memorandum Opinion and Order, 12 FCC Rcd 22665 ("1997 MO&O").

Also, in 1996,[3] the Commission had expressed a belief that carriers might insulate themselves from liability contractually, at least with regard to their own customers:

> "We conclude that is unnecessary to exempt providers of E-911 service from liability for certain negligent acts, as PCIA and U.S. West request. If E-911 wireless carriers wish to protect themselves from liability for negligence, they may attempt to bind customers to contractual language...."

11 FCC Rcd, at 18727

It is now apparent that neither of those approaches will work. In California, for example, the state legislature has refused to enact any kind of E-911 liability protection for wireless carriers. Further, USCC is advised by California counsel that the state law does not favor contracts which seek to exempt one party from liability. California is far from alone in this position. And moreover, as the Commission itself recognized in the 1997 MO&O (12 FCC Rcd at 22733), whatever their rights may be in connection with their subscribers, carriers certainly cannot contractually insulate themselves from liability for E-911 calls they carry for non-subscribers pursuant to FCC order.

While it would certainly be preferable, from the FCC's standpoint, if the liability issue could be worked out at the state level, the fact is that in many states, including California, the largest in the nation, it has not been and the FCC therefore cannot any longer avoid consideration of the potential consequences of that failure.

As noted above, the E-911 regulatory structure is one of mutual and balanced responsibilities on the part of wireless carriers and the states. However, a state refusal to enact liability protection

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[3] In the Matter of Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19876 (1996) ("1996 R&O").

for wireless carriers is an act of irresponsibility, entirely at odds with this regulatory structure, which poses a greater threat to the provision of E-911 service than inadequate or non-existent cost recovery.

No cellular system should have to spend the time and incur the large expense of E-911 installation (with its obvious public interest benefits, including to persons other than cellular subscribers) if it has to face the threat of multimillion dollar liability judgments if a particular emergency call, for whatever reason, from foliage to rain attenuation to a system "dead spot," does not get through. Allowing for such liability claims as a consequence of the enhanced public safety which E-911 will undoubtedly provide to most wireless end users, an enhancement which previously did not exist for anybody, is simply wrong.

Cellular carriers now have a duty to provide E-911 service within their markets. The service will of course be limited by the imperfections in signal coverage mentioned above, and also by inevitable problems in ANI technology development. Moreover, PSAP personnel do not always ask the correct questions of emergency callers or respond with the right degree of alacrity. Police and other emergency personnel sometimes get lost or otherwise fail to respond promptly after being called by the PSAP.

Wireless carriers should not be held liable for any of this, and should not be put to the time, trouble, and expense of having to explain to juries, for example, that a call did go through but the PSAP failed to respond, etc. any more than wireline telephone companies presently are or should be.

Thus, the FCC should act to pre-empt state laws by ruling that wireless carriers are protected from liability for any acts other than willful misconduct or grossly negligent behavior. The grounds for pre-emption would be that for states to allow carriers to be held liable under any other

circumstances would threaten the existence of E-911 service.

However, if the Commission is unwilling to involve itself with the pre-emption of state tort laws, it can certainly declare that wireless carriers need not offer E-911 service until they are free of the threat of liability for other than "willful misconduct" or "grossly negligent" behavior.

It is perhaps understandable, given their interest in lucrative judgments and contingency fees, that the trial bar in California and elsewhere does not wish wireless carriers to be immune from ordinary liability, as wireline telephone companies have been. But it is, we submit, the duty of the FCC to support the integrity of the E-911 process by stating clearly and unequivocally that the compelled provision of a public service should not have as a concomitant the real threat of bankruptcy.

The FCC understandably does not wish to involve itself in unnecessary conflicts with the states. However, if states, by their actions or irresponsible inactions, make it impossible for FCC licensees to carry out their FCC imposed responsibilities, the Commission can either take pre-emptive action or, relieve licensees of those responsibilities.

Hence, the FCC should answer the first question in the affirmative.

## II. If the FCC Declines to Protect Carriers From Liability, It Should Rule That Reimbursement For Liability Insurance Is A Necessary Part of Cost Recovery

If the FCC answers the first question, "yes," it will not have to deal with the second question, which asks whether the cost of liability insurance policies should be considered a "cost recovery" item which states must reimburse. If, however, it answers that question "no" it will have to consider the second question.

Though we stress that it is a "second best" solution, the answer to this question must also clearly be "Yes."

In the FCC's 1996 E-911 order, the Commission stated the basic principle that, "[n]o party disputes the fundamental notion that carriers must be able to recover their costs of providing E-911 service."[4] If carriers are not freed of the threat of unforeseeable liability determinations, they will have to buy insurance to mitigate that threat, as do doctors, lawyers, and other professionals.

Clearly, insurance premiums will be a cost of providing E-911 service, since they would not have to be paid but for the provision of such service. Accordingly, the logic of cost recovery dictates that the states will have to reimburse wireless carriers for their insurance costs. Those costs will be large. In California, they have been projected in the Senitte letter to be $50 million per year.

However, such reimbursement, while certainly a legitimate and indeed mandatory item of cost recovery, will have various undesirable side effects. It will increase the costs of E-911 deployment and thus undoubtedly increase the surcharges which customers will pay to recover the costs of such deployment. It will also help to generate litigation, as wireless customers wishing to sue about E-911 issues come to understand that they can obtain recoveries against deep-pocketed insurance companies, as well as their wireless carriers.

Again, answering the first question in the affirmative would preferable, but if the Commission wishes to avoid that conflict with the states it must face up to the issue of insurance reimbursement as a mandatory part of cost recovery.

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[4] 1996 R&P, supra, 11 FCC Rcd, at 18722.

## III. The FCC Should Reiterate That The "Appropriate" PSAP Is The One Designated By the States

Finally, the third question, dealing with the "appropriate PSAP" also involves an issue of state responsibility, in both senses of the word.

In the 1997 MO&O, dealing with E-911 issues, it is clearly stated that:

> "To the extent that the terms 'appropriate' and 'designated' PSAPs as used in the E911 First Report and Order, may be unclear, we wish to clarify that the responsible local or state entity has the authority and responsibility to designate the PSAPs that are appropriate to receive wireless 911 calls."

1997 MO &O, 12 FCC Rcd, at 22713.

Given the crystal clarity of that allocation of responsibility, it is odd that the third question has been asked at all. Evidently, it also grows out of California politics, namely an unwillingness on the part of the state legislature to shift the E-911 responsibility from the California Highway Patrol, where it now resides, to the PSAPs.

Again, the FCC cannot force states to act responsibly, but it can make clear that its wireless licensees should not have to do anything but follow state law with respect to the appropriate PSAP. Wireless carriers should not ever be put in the position of determining who the appropriate recipient of emergency calls should be. The state must designate the appropriate PSAPs, cellular carriers must make their best efforts to transmit calls to those PSAPs and to carry out their other E-911 responsibilities, and there the responsibility of wireless carriers should end.

It is easy to foresee the possibilities of litigation and potential carrier liability if wireless carriers are given the dubious "right" of determining the appropriate PSAP even in the face of an explicit state law designating the recipient of E-911 calls. Such an outcome would be totally

undesirable. As with the prior questions, wireless carriers should not be held responsible for state irresponsibility.

## Conclusion

This is a proceeding of great importance. By answering the questions as USCC has requested, the FCC can help restore the appropriate balance of responsibilities between carriers and the states which is essential to its the maintenance of its E-911 regulatory structure.

Respectfully submitted,

**UNITED STATES CELLULAR CORPORATION**

By: _____

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August 14, 1998

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August 14, 1998

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Re: Request for Emergency Declaratory ruling Regarding
Wireless Enhanced 911 Rulemaking Proceeding Filed
By the State of California E-911 Program Manager,
C.C. Docket 94-102

Dear Ms. Salas:

Herewith transmitted on behalf of United States Cellular Corporation are an original and five copies of its Comments on the above-referenced request filed in response to the FCC's July 30, 1998 Public Notice (DA 98-1504) requesting comments.

In the event there are any questions concerning this matter, please communicate with the undersigned.

Very truly yours,

Peter M. Connolly